Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Schools and Libraries	)	CC Docket No. 02-6
Universal Service Support Mechanism	)	
	)	
Request for Review and/or Waiver	)	
By South San Antonio (Texas)	)	Application No. 482920
Independent School District	)	

REQUEST FOR REVIEW AND/OR WAIVER
BY THE SOUTH SAN ANTONIO (TEXAS) INDEPENDENT SCHOOL DISTRICT
OF A FUNDING DECISION BY THE
UNIVERSAL SERVICE ADMINISTRATIVE COMPANY

Pursuant to sections 54.719 and 54.722 of the Commission's rules,[1] the South San Antonio Independent School District (South San Antonio or the District) hereby respectfully requests a review of a Universal Service Administrative Company (USAC) decision to adjust South San Antonio's funding request and seek recovery of funding disbursed in 2005. USAC's attempt to recover these funds is time-barred by the general federal statute of limitations in 28 U.S.C. § 2462, violates South San Antonio's due process rights, and is wrong on the merits. Accordingly, the Wireline Competition Bureau (Bureau) should grant this appeal, and/or any waivers necessary or warranted, and remand the above-captioned application to USAC with instructions to re-instate the funding commitment and cancel this recovery request.

[1] 47 C.F.R. § 54.719(b), (c); 47 C.F.R. § 54.722(a).

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EXECUTIVE SUMMARY

South San Antonio seeks review of a commitment adjustment decision letter (COMAD) from USAC, revoking South San Antonio's E-rate commitment for funding year 2005 and seeking recovery of the disbursed funds. As an initial matter, USAC's recovery action is prohibited by the applicable federal statute of limitations. Section 2462 of Title 28 of the United States Code prohibits USAC from seeking recovery of E-rate funding more than five years after the funding was disbursed. Section 2462 states that "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued."[2] USAC did not address South San Antonio's statute of limitations argument in its denial of South San Antonio's appeal. However, neither USAC nor the Commission has the authority to override or ignore a statute of limitations established by Congress.

USAC also did not address South San Antonio's argument that issuance of this COMAD violated South San Antonio's due process rights. But no school district can be expected to mount a robust defense more than a decade after the alleged violations of the E-rate rules occurred. The passage of time and the departures of key staff involved in the 2005 bidding process, as well as USAC's failure to provide South San Antonio with some of the requested documentation relating to the COMAD, have made it extremely and unfairly challenging for South San Antonio to defend itself against USAC's allegations.

As for USAC's specific findings, South San Antonio urges the Bureau to reverse them on the merits. USAC found that South San Antonio failed to leave its RFP open for the 28 days

[2] 28 U.S.C. § 2462.

required by Commission rules. The rule, however, states that an applicant must wait 28 days before signing a contract with its services provider, not that potential bidders must be given that long to file their bids. While the Commission has adopted the latter interpretation in recent years, in 2005 there was no indication that the Commission interpreted the rule to mean anything other than what the rule actually says: there must be 28 days between the filing of the 470 and the signing of the contract. South San Antonio satisfied that rule requirement here. Accordingly, USAC's decision must be reversed.

USAC also found that South San Antonio failed to consider price as the primary factor when it selected the winning bid. This finding is in error because South San Antonio's technology director at the time thought she was selecting the only bid that satisfied all of the criteria laid out in the RFP. If she was mistaken in this belief, as USAC alleges, South San Antonio's students still should not be punished for her error more than a decade later.

USAC also found that South San Antonio had purchased and installed services to an ineligible entity. While USAC is correct that South San Antonio purchased services for a school (Antonio Olivares Elementary School) that it subsequently leased to Texas A&M University, the school was an eligible entity at the time that the services were installed, South San Antonio still owns the equipment. Furthermore, USAC has not provided documentation explaining how it calculated the amount it seeks to recover for this alleged violation, even though South San Antonio has asked USAC to provide such documentation. South San Antonio respectfully argues that USAC should have to support its recovery actions with documentation—especially when the funds were disbursed more than a decade ago, and the school district is no longer required to retain the relevant documentation. At a minimum, the Bureau should direct USAC to

provide documentation to South San Antonio showing how USAC calculated the amount it seeks to recover.

Finally, South San Antonio urges the Bureau to consider the effect of USAC's decision on the students and families that South San Antonio serves. South San Antonio is a poor school district, and having to repay more than $9 million in E-rate funding will have a devastating financial impact. This impact is all the more severe given that USAC's COMAD comes 12 years after the funding year in question. It is simply unjust and excessively punitive to demand repayment of the entire amount of funding for alleged mistakes made more than a decade ago by school district staff who are long gone. Accordingly, to the extent that the Bureau agrees with USAC's decision, South San Antonio respectfully requests that the Bureau waive the Commission's rules to the extent necessary to prevent this punitive and unfair outcome.

I. BACKGROUND

The South San Antonio Independent School District is located in San Antonio, Texas. The district serves approximately 9,400 students who attend nine elementary schools, three middle schools, and one high school.

On January 12, 2005, South San Antonio's then technology director, Sandra Soto, posted an FCC Form 470 seeking bids for internal connections.[3] USAC assigned an allowable contract date of February 9, 2005.[4] On January 24, 2005, South San Antonio released an RFP for wireless network installation and network upgrades, all services falling under the category of internal connections.[5] Among a variety of criteria required of successful bids, the RFP specified that "[t]he vendors will not sub-contract, or enter into any subcontracts pertaining to this contract."[6] The RFP requested responses by February 8, 2005.[7]

South San Antonio received four bids in response to its RFP, from Avnet (aka Calence, now Insight Public Sector, Inc.), Presidio, RxTechnologies, and SBC. Ms. Soto reviewed the bids to ensure that the key criteria laid out in the RFP had been met.[8] In the course of this process, Ms. Soto determined that three of the four bidders—Presidio, RxTechnologies, and SBC—had failed to satisfy the criteria identified in the RFP. She therefore disqualified those three bids, leaving Avnet as the only bid that was fully responsive to the RFP.[9] Accordingly,

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[3] *See* Exhibit 1, FCC Form 470.

[4] *See id.*

[5] *See* Exhibit 2, South San Antonio's 2005 Request for Proposal (RFP).

[6] *See id.* at 2.

[7] *See id.* at 1.

[8] *See* Exhibit 3a, bid submitted by Avnet; Exhibit 3b, bid submitted by AT&T; Exhibit 3c, bid submitted by Presidio; Exhibit 3d, bid submitted by from RxTechnologies.

[9] Exhibit 4, Competitive Bidding Matrix; Exhibit 5, Letter from Sandra A. Soto, Information on RFP 05-48 dated February 9, 2009.

South San Antonio selected Avnet as the winning, and only responsive, bid. The South San Antonio school board approved the contract at its board meeting on February 16, 2005—just one day before the funding year 2005 application deadline of February 17, 2005.[10] Avnet officially signed the contract on February 18, 2005.[11] South San Antonio subsequently requested E-rate funding for 2005. USAC awarded the district approximately $13 million, of which it used a little more than $9 million.[12]

In early 2009, USAC initiated an audit and special compliance review of E-rate disbursements made by USAC to South San Antonio in the 12-month period that ended June 30, 2008. The audit was not specific to funding year 2005, and it appears that the auditors primarily requested documentation from 2006 and 2007.

In 2011, USAC requested information about the funding year 2005 application, and South San Antonio replied with a lengthy response on July 30, 2011. On November 8, 2013—nearly seven years after the equipment was installed—USAC sent South San Antonio a notice of intent to deny funding for funding year 2005.[13] In this letter, USAC stated that "[a]fter a thorough investigation it has been determined that this funding commitment [for funding year 2005] must be rescinded in full."[14] USAC identified three reasons for this conclusion.

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[10] *See* Exhibit 6, Board Minutes from February 16, 2005 Board Meeting, attachment (South San Antonio Department of Technology Memorandum). Ms. Soto's recommendation to the board is dated January 6; it appears she simply neglected to change the date after using the same memo format for the RFP recommendation to the board.

[11] *See* Exhibit 7, Avnet Contract with South San Antonio.

[12] *See* Exhibit 8, Notification of Commitment Adjustment Letter dated June 21 (COMAD).

[13] *See* Exhibit 9, Notice of Intent to Deny Letter (Nov. 8, 2013), at 1.

[14] *Id.*

First, USAC found that it could not be determined whether South San Antonio had used price as the primary factor, as required by Commission rules, in selecting the winning bid. USAC noted that the district had evaluated bids using a "yes or no" worksheet that "did not disclose[] the weighted evaluation factors which indicate that price of the eligible products and services was the primary factor considered in selecting the winning service provider's proposal."[15] USAC also pointed out that the winning bidder, Avnet, included exceptions and omissions in its bid, just as the disqualified bidders had.[16] Finally, USAC found that SBC's bid had been inappropriately disqualified, because SBC appeared to have subsequently contradicted its initial representation that it would use subcontractors.[17] Accordingly, USAC found that South San Antonio had not used price as the primary factor in its vendor selection process, and that this was grounds for rescinding its 2005 funding commitment in full.[18]

Second, USAC found that South San Antonio had failed to leave its RFP open for the 28 days, instead leaving it open for only 14 days, and rescinded the funding commitment in full.[19]

Third, USAC found that services had been installed at an ineligible entity.[20] One of the elementary schools for which South San Antonio had purchased services with 2005 funding had been leased to Texas A&M University at the end of 2006, and all South San Antonio students had been transferred to another location.[21] According to USAC, this lease rendered the school,

[15] *Id.*

[16] *Id.*

[17] *See id.*

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] *See id.*

Antonio Olivares Elementary School, an ineligible entity.[22] USAC stated that it therefore sought recovery of $523,473 in funding for services installed at that school, but did not provide support for how it arrived at that amount.[23]

South San Antonio, through its consultant Kellogg and Sovereign, responded to the intent to deny on November 22, 2013.[24] South San Antonio had no communication from USAC on this application for the next 3½ years. As far as South San Antonio knew, USAC had decided not to move forward with a denial.

Then, out of the blue, on June 21, 2017, USAC sent a COMAD notifying South San Antonio that it was rescinding its funding commitment for internal connections for funding year 2005 and that South San Antonio must repay the $9,026,130.97 disbursed for those services.[25] The COMAD included the same three reasons for rescinding funding that USAC had identified in its 2013 notice of intent to deny letter.[26]

South San Antonio filed a timely appeal of the COMAD. In its appeal, South San Antonio argued that the COMAD was barred by the general federal statute of limitations at 28 U.S.C. § 2462, that USAC's recovery effort violated South San Antonio's due process rights, and that USAC's grounds for rescinding funding were incorrect on the merits. On August 29, 2017, USAC denied South San Antonio's appeal, concluding that South San Antonio had "not demonstrated on appeal that USAC's determination was incorrect," but without providing any

[22] *See id.*

[23] *See* id.

[24] *See* Exhibit 10, Email from Jane Kellogg, Kellogg and Sovereign, to Jeff Walsh, USAC, Nov. 22, 2013.

[25] *See* Exhibit 8.

[26] *See id.* at 4-5.

further rationale or response to South San Antonio.[27] South San Antonio herein timely files its request for review and/or waiver with the Commission.[28]

II. USAC'S RECOVERY ACTION IS TIME BARRED BY THE GENERAL FEDERAL STATUTE OF LIMITATIONS

First and foremost, USAC violated federal law by issuing this COMAD. Section 2462 of Title 28 of the United States Code prohibits USAC from seeking recovery of E-rate funding more than five years after the funding was disbursed. Section 2462 states:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.[29]

The courts have made it clear that section 2462 applies to agency administrative proceedings as well as judicial proceedings,[30] and that section 2462 applies to actions taken pursuant to the Communications Act.[31] The Supreme Court has explained, when applying section 2462, that a "penalty" addresses a wrong against the public, not an individual, and is sought for the purpose of punishment and deterrence, not just compensation of a victim.[32] Rescission of E-rate funding satisfies this definition, as there is no individual that is a victim here. Even if USAC believes South San Antonio should have selected a different winning

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[27] *See* Exhibit 11, USAC Decision on Appeal, at 1 (Aug. 29, 2017). Although USAC included some additional statements of and citations to Commission rules in its denial, it did not appear to find additional grounds for rescinding South San Antonio's 2005 funding.

[28] 47 C.F.R. § 54.719(b), (c); 47 C.F.R. § 54.722(a).

[29] 28 U.S.C. § 2462.

[30] *See* 3M Company v. Browner, 17 F.3d 1453, 1456-57 (D.C. Cir. 1994).

[31] *See* United States v. Worldwide Industrial Enterprises, 220 F. Supp. 3d 335, 338 (E.D.N.Y. 2016).

[32] Kokesh v. SEC, 581 U.S. __ (2017).

bidder, USAC will not provide any recovered funds to that vendor. Instead, USAC is seeking the return of funding to address a "wrong" against the E-rate program and to recoup money for the Universal Service Fund on behalf of the federal government. South San Antonio's commitment adjustment and recovery of funding thus constitutes a "penalty" for purposes of section 2462.[33] It is therefore clear that section 2462 applies to recovery actions by USAC, and that this recovery action is well outside the five-year statute of limitations that section 2462 imposes.

To South San Antonio's knowledge, the Commission has never addressed the applicability of section 2462 to recovery actions by USAC, and its recent *Net56* and *Sandwich Isles* orders may have created uncertainty by suggesting that USAC recovery actions are subject to no time limitations whatsoever. But declining to acknowledge a statutory limitation period does not make it any less applicable: neither the Commission nor USAC has the authority to override or ignore a statute of limitations imposed by Congress.

None of the Commission's or the Bureau's precedent, nor the judicial precedent cited therein, satisfactorily explains why section 2462 would *not* apply to USAC investigations. In *Net56*, *Sandwich Isles*, and related orders, the Commission explained why its own precedent did not create an absolute bar to recovery: because only Congress has that power.[34] But those orders made no mention of the fact that Congress *has* established a five-year statute of

[33] Even if a USAC recovery action did not constitute a "penalty" as defined by the Supreme Court, it would nonetheless be subject to the five-year statute of limitations because it is a "forfeiture" as that term is used in section 2462. *See* SEC v. Graham, 823 F.3d 1357 (11th Cir. 2016) (explaining that the common meaning of "forfeiture" is the requirement that a person turn over money or property because of a breach of legal duty).

[34] *See, e.g.*, *Net56 Order*, 32 FCC Rcd at 966 ¶ 9 & n.31 (*citing* Royal Indemnity Co. v. United States, 313 U.S. 289, 294 (1941), *United States v. Wurts*, 303 U.S. 414, 416 (1938)).

limitations that applies to agency actions across the federal government. The Supreme Court precedent that the Commission relied on in those orders has no bearing on whether section 2462 applies to USAC recovery actions: *Wurts* involved an IRS-specific statute of limitations, and *Royal Indemnity* did not involve a statute of limitations at all.[35] USAC declined to address South San Antonio's argument that section 2462 prohibits this COMAD. We respectfully argue that the Commission cannot do the same: if section 2462 does not apply to USAC recovery actions, the Bureau must explain why it does not.

Further, the Supreme Court has explained on numerous occasions why statutes of limitations are so important as a matter of policy. In *Kokesh v. SEC*, a recent case applying the statute of limitations in section 2462 to disgorgement actions by the Securities and Exchange Commission, the Supreme Court explained that statutes of limitations "are 'vital to the welfare of society' and rest on the principle that 'even wrongdoers are entitled to assume that their sins may be forgotten.'"[36] The Court has gone so far as to point out that "[i]n a country where *not even treason* can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain forever liable to a pecuniary forfeiture."[37]

The Commission has similarly recognized that there are important policy reasons to have a limitation period for recovery actions. In its *Fifth Report and Order*, the Commission established a policy that "USAC and the Commission shall carry out any audit or investigation

[35] In *Royal Indemnity*, the Court held that a tax collector may not forgive a tax debt because he has not been specifically authorized to do so by Congress; Congress gave the power to enter into settlements to the IRS Commissioner only. *Royal Indemnity*, 313 U.S. at 294-95. In *Wurts*, the Court held that the statute of limitations for a mistaken tax refund starts to run when the refund is paid, not when it is "allowed." *Wurts*, 313 U.S. at 418.

[36] *Id.*

[37] 3M v. Browner, 17 F.3d at 1457 (*quoting* Adams v. Woods, 6 U.S. (2 Cranch) 336, 341, 2 L.Ed. 297 (1805) (Marshall, C.J.) (emphasis added).

that may lead to discovery of any violation of the statute or a rule within five years of the final delivery of service for a specific funding year."[38] In adopting that policy, the Commission recognized that "conducting inquiries within five years strikes an appropriate balance between preserving the Commission's fiduciary duty to protect the fund against waste, fraud and abuse *and the beneficiaries' needs for certainty and closure in their E-rate application processes*."[39]

It is true that within the past year, the Commission has concluded that the five-year investigation period established in the *Fifth Report and Order* is a "policy preference" and "not an absolute bar to recovery."[40] However, the Commission has not explicitly overturned the *Fifth Report and Order*, and in fact has reiterated the Commission's belief "that the best course is for USAC to aim to complete its investigations and seek recovery of funds within five years, whenever possible" and directed USAC "to incorporate that as an objective in its annual performance metrics plan."[41] In this case, USAC did not complete its investigation within five years. Its intent to deny letter in 2013 came nearly seven years after installation of the services, and USAC had neither completed its investigation nor sought recovery at that time. That took another four years – for a total of 11 years after installation.

Even if no formal statute of limitations applied to E-rate recovery actions, the policy concerns that the Supreme Court emphasized in *Kokesh*, and the Commission in the *Fifth Report*

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[38] *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15819 ¶ 32 (2004).

[39] *Id.* ¶ 33 (emphasis added).

[40] *Application for Review of a Decision of the Wireline Competition Bureau by Net56, Inc.*, CC Docket No. 02-6, Memorandum Opinion and Order, 32 FCC Rcd 963, 966 ¶ 9 (2017) (*Net56 Order*); *see also Sandwich Isles Communications, Inc.*, WC Docket No. 10-90, Order, 31 FCC Rcd 12999, 13026-27 ¶ 92 (2016) (*Sandwich Isles Order*).

[41] *Net56 Order*, 32 FCC Rcd at 966 ¶ 9.

and Order, would be no less applicable. It would still be unjust and unreasonable to recognize no statute of limitations for recovery actions, particularly considering that even *fraud* committed against the federal government is subject to a ten-year statute of limitations.[42] It is difficult to imagine that Congress would impose statutes of limitations for treason and fraud, yet intend that mere mistakes made by school districts be punishable into perpetuity. And even if USAC were unaware that it is bound by a statutory five-year statute of limitations, as a matter of good policy and essential fairness, it still should be far more hesitant than it is to seek recovery of funds disbursed more than a decade ago.

Finally, the Commission has referred to the Debt Collection Improvement Act as a reason why there can be no statute of limitations on USAC recovery actions.[43] But the DCIA comes into play once a debt has been established.[44] It has no bearing on how long an agency has to investigate whether a debt exists. It is one thing to say that no statute of limitations applies to efforts to collect a debt that the federal government has determined it is owed; it is another thing entirely to say that no statute of limitations applies to the ability of a government agency to *launch and complete an investigation*, the potential outcome of which might be that a debt is owed.[45] South San Antonio knows of no judicial precedent that would support an argument that

[42] 31 U.S.C. § 3731(b) (False Claims Act).

[43] *See, e.g.*, *Net56 Order*, 32 FCC Rcd at 966-67 ¶ 10.

[44] *See* 37 U.S.C. § 3711(a)(1) (providing that an agency head "shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency").

[45] It would make no sense, as noted above, to conclude that Congress intended to impose a time limit on the recovery of federal funds for fraud, but not for mistakes.

the general applicability of section 2462 is nullified by the mere possibility that a debt to the federal government might be unearthed at the end of an investigation.[46]

USAC may not have known that a statutory five-year statute of limitations applies to recovery actions, but that does not make the statute of limitations any less applicable. USAC should have complied with the statute of limitations that Congress established for recovery actions such as this one. The Bureau should therefore reverse USAC's decision.

III. USAC'S RECOVERY ACTION VIOLATES SOUTH SAN ANTONIO'S DUE PROCESS RIGHTS

Even if it were not time-barred by section 2462, USAC's COMAD would violate South San Antonio's due process rights. No school district can be expected to mount a robust defense more than a decade after the alleged violations of the E-rate rules occurred. The passage of time and the departures of key staff involved in the 2005 bidding process have made it extremely and unfairly challenging for South San Antonio to respond to USAC's inquiries.

USAC's second guessing South San Antonio's bid evaluation process years after the fact merely proves the unfairness of seeking recovery of funds so long after the funds were disbursed. In 2013, when USAC sent the intent to deny letter, South San Antonio's then-current staff could only do their best to address USAC's concerns with the limited documentation from 2005. They had no one to ask for clarification or explanation. Now, an additional four years have passed, and the challenge of responding to a COMAD so long after the fact is that much more severe.

[46] The Commission has cited the *U.S. v. Wurts* decision from 1938 as support for the proposition that recovery actions for universal service funds are not barred by the passage of time. *See, e.g., Sandwich Isles Order*, 31 FCC Rcd at 13027 ¶ 93 & n.193; *Request for Review of Decisions of the Universal Service Administrator by Joseph M. Hill Trustee in Bankruptcy for Lakehills Consulting, LP,* CC Docket No. 02-6, Order, 26 FCC Rcd 16586, 16601, para. 28 (2011). But the Commission has never addressed whether and how section 2462 affects this conclusion.

This is exactly the kind of scenario the Supreme Court had in mind when it wrote that "[s]tatutes of limitations are intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'"[47] It is virtually impossible for school districts to defend themselves adequately when so much time has passed since the alleged violations.

South San Antonio's ability to respond to this recovery action has been further hampered by USAC's inability to provide requested documentation relating to the COMAD. At a remove of 12 years, the District was not sure it still had the relevant documentation from funding year 2005, so on July 31, 2017, the District asked USAC to provide any documentation in its possession related to this commitment adjustment. USAC did not respond to this request in time for South San Antonio to incorporate any relevant documentation into its USAC appeal. When USAC finally responded with a sizeable number of documents on August 31, 2017—two days after denying the appeal—only one of those documents, the COMAD itself, was from funding year 2005. The rest were irrelevant to this appeal. When USAC eventually provided information regarding funding year 2005, on October 11, 2017, it failed to provide a document specifically referenced as justifying the denial in the COMAD, as well as the invoices or whatever documentation supports the recovery amount for equipment installed at Antonio Olivares Elementary. In any event, even if South San Antonio had received relevant information from USAC, that documentation likely would not have told the whole story. South San Antonio's own records have not all been retained—the records retention requirements expired

[47] Gabelli v. SEC, 568 U.S. 442, 448 (2013).

several years ago[48]—and South San Antonio has since had significant turnover in personnel, as is often the case in a public school district when 12 years have passed, and thus cannot merely ask the personnel involved in the 2005 competitive bidding process for their recollections.

USAC's COMAD also fails to recognize that the state of the E-rate program was very different in 2005. First of all, the deadline for filing applications was much earlier than it is now: school districts had to file their applications by February 18.[49] In addition, the grace periods that exist now for signing contracts with service providers and for filing applications did not exist in 2005.[50] If South San Antonio had missed either deadline, it had no hope of receiving a waiver from the Commission. In short, South San Antonio was much more up against the clock in 2005, than it would be today, and any mistakes it made should be analyzed in light of the fact that it was rushing to get its application filed by the deadline. USAC's failure to do so deprives South San Antonio of due process.

Finally, even if USAC's COMAD were consistent with federal law, it would be a wildly disproportionate punishment for USAC to revoke an entire year's funding—more than $9 million—12 years after it was awarded. The Commission has decreed far less punitive

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[48] In 2005, the Commission required records to be kept for five years. This requirement was changed in 2014 to 10 years. 47 C.F.R. 54.516(a); *see also Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870, ¶¶ 262-263 (2014) (*First Modernization Order*).

[49] The original deadline was February 17, 2005, but USAC extended it by one day because it had incorrectly stated the last day to file a Form 470 was January 21 and still file a Form 471 by the filing deadline. *See* http://www.sl.universalservice.org/whatsnew/2005/012005.asp#012505.

[50] *See First Modernization Order* at ¶ 203 (modifying the requirements for legally binding agreements); *see, e.g., Requests for Waiver and Review of Decisions of the Universal Service Administrator by Academy of Math and Science et al.*; *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 25 FCC Rcd 9256, 9259 ¶ 8 (2010) (finding special circumstances exist to justify granting waiver requests where, for example, petitioners filed their FCC Forms 471 within 14 days after the FCC Form 471 filing window deadline).

penalties to E-rate participants that have committed *fraud*, which USAC did not allege here.[51] To uphold a $9 million recovery action against a school district that simply made mistakes while punishing fraud on a much larger scale with a mere $3 million penalty would be arbitrary and unjust.

Assessing a $9 million punishment under these circumstances is harsh on its face. It is all the more draconian given that the funding in question was disbursed *12 years ago*. USAC's decision will have a devastating impact on South San Antonio's budgets for years to come. South San Antonio's total annual budget is $75 million, which means the recovery amount is 12 percent of its annual budget.[52] There is no way the district can sustain an unexpected hit of that amount, even if spread out over a decade or more. If there was any wrongdoing by the 2005 staff or the service provider, they will not have to pay this penalty. Instead it will be solely borne by South San Antonio students and taxpayers.

As Chairman Pai said in his *First Modernization Order* dissent, "Stripping schools and libraries of their procedural rights doesn't do them any service."[53] USAC's actions in pursuit of this recovery action—the long delays, the inability or unwillingness to provide supporting documentation upon request—have violated South San Antonio's due process rights and made it challenging, if not impossible, to mount a robust and complete defense. For this reason, South San Antonio urges the Bureau to reverse USAC's decision.

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[51] *See, e.g.*, *New York City Department of Education*, Order, 30 FCC Rcd 14223 (Enf. Bur. 2015) (entering into a consent decree requiring the New York City Department of Education to pay a $3 million fine for having defrauded the E-rate program).

[52] *See* South San Antonio ISD Budget Workshop #5, dated Aug. 2, 2017, https://v3.boardbook.org/Public/PublicItemDownload.aspx?ik=40965277.

[53] *First Modernization Order*, 29 FCC Rcd at 9040 (dissenting statement of Commissioner Ajit Pai). In his dissent, Chairman Pai also objected to the possibility of "a school or library [being] stuck with a multi-million dollar bill from the government a decade after the fact." *Id.*

IV. USAC'S COMAD AND DENIAL OF SOUTH SAN ANTONIO'S APPEAL ARE INCORRECT ON THE MERITS

A. South San Antonio Did Not Violate the 28-Day Rule

USAC found that South San Antonio failed to leave its RFP open for the 28 days required by Commission rules. Section 54.503(c)(4) of the Commission's rules requires a district to wait 28 days after posting the FCC Form 470 before signing a contract.[54] The rule itself does not say anything about the length of the competitive bidding process.

Specifically, the rule requires applicants to wait 28 days after the posting of the FCC Form 470 "before making commitments" with the selected service provider, and South San Antonio did exactly that. Its Form 470 was filed on January 12, 2005, and the South San Antonio school board determined the selected service provider on February 16, 2005. Avnet signed the contract with South San Antonio on February 18, 2017—37 days after the Form 470 was posted.[55] Therefore, South San Antonio did not violate the 28-day rule.

The Commission nonetheless now interprets the 28-day rule to require that the competitive bidding period remain open for 28 days.[56] Neither USAC nor the Commission

[54] 47 C.F.R. § 54.503(c)(4) ("That entity shall then wait at least four weeks from the date on which its description of services is posted on the Administrator's Web site before making commitments with the selected providers of services."). The text of this rule was the same in 2005 as it is now, but it was at section 54.504(b)(4).

[55] While Avnet signed the contract on February 18, 2005, the school district approved the contract at its board meeting on February 16, 2005. *See* Exhibit 6, South San Antonio School Board Minutes. As such, there was a legally binding agreement after the 28-day period and before the application filing date of February 18, 2005.

[56] *See, e.g.*, *Application for Review of a Decision of the Wireline Competition Bureau by Dooly County School System, Vienna, Georgia*, CC Docket No. 02-6, Order, 28 FCC Rcd 8612, 8613 ¶ 2 (2013) (*Dooly County Order*).

should apply the rule in a way that conflicts with the plain language of the text.[57] In addition, we note that while a different interpretation is used now, the case at issue is 12 years old and the rule interpretation appears to have evolved since that time.[58]

To the extent that South San Antonio erred at all, its error may have been caused by a simple misunderstanding. As noted above, the South San Antonio technology director at the time, Sandra Soto, posted the District's FCC Form 470 on January 12, 2005. When posted, the District received an allowable contract date of February 9, 2005. The RFP was not issued until a few days later, on January 24, 2005. When Ms. Soto posted South San Antonio's Form 470 and was given an allowable contract date of February 9, 2005, she may not have realized that the RFP needed to be posted on the same day or USAC would start the 28-day clock on the date the RFP was issued. In fact, Ms. Soto's memo to the school board supports this view. In it, she wrote that "[u]nder the federal E-rate rules, these RFPs had to be posted *on a Form 470* on the Schools and Library's [*sic*] Division (SLD) web site for twenty-eight days. The District was not allowed to select a vendor until the twenty-eight days had elapsed. The SLD informed us that the Allowable Vendor Selection/Contract Date is: February 9, 2005." (emphasis added).[59]

[57] If the Commission wants the rule to mean that applicants should keep the competitive bidding process open for 28 days, then it should amend the rule accordingly. It has conducted several rulemakings for the E-rate program since adopting the rule.

[58] *Compare, e.g., Schools and Libraries Universal Service Support Mechanism*; *A National Broadband Plan For Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Sixth Report and Order, 25 FCC Rcd 18762, 18788 ¶ 55 (2010) ("After submitting an FCC Form 470, the applicant must wait at least 28 days before making a commitment with its selected service providers."), *with, e.g., Dooly County Order*, 28 FCC Rcd at 8613 ¶ 2 (2013) ("After submitting an FCC Form 470, the applicant must wait at least 28 days after the date that the FCC Form 470 is posted and the date the RFP is issued, whichever is later, *before closing the competitive bidding process* and making commitments with the selected service providers.") (emphasis added)).

[59] Exhibit 6, Attachment, South San Antonio Department of Technology Memorandum.

If the concern is that a few days' difference in the competitive bidding process reduced the number of respondents—or worse, that that was Ms. Soto's intent—contrary evidence shows that was not the case. Ms. Soto mailed the RFP to nine potential vendors.[60] South San Antonio also posted notice of the procurement process in the local newspaper on January 22nd through the 28th.[61] Four vendors submitted bids on time.

Finally, South San Antonio asks USAC to reverse its decision to rescind funding for 2005 because the failure to leave the bidding open for 28 days did no harm to the competitive bidding process, and thus no harm to the Fund. South San Antonio received four bids, a respectable number, and South San Antonio has no record that any of the responding bidders, or any other potential bidders, requested additional time to respond or otherwise complained about the response period. There is no reason to believe that South San Antonio would have received more bids, or that the bids it did receive would have been different in any way, if the RFP's submission date was later. There is thus no reason to believe that the response period harmed the competitive bidding process or the Fund.

B. South San Antonio Did Not Violate the Price-As-Primary-Factor Rule

USAC also found that South San Antonio failed to consider price as the primary factor when it selected the winning bid. This finding is in error because South San Antonio selected the only bid that satisfied all of the criteria laid out in the RFP.

South San Antonio, like most poor school districts, makes a good-faith effort to comply with the E-rate rules. But school districts sometimes make mistakes, and Ms. Soto appears to have made a mistake in her review of the bids in 2005. A reading of the bids now reveals that

[60] *See* Exhibit 12, Bid Documentation dated Jan. 21, 2017.

[61] *See* Exhibit 13, South San Antonio Express News advertisements.

Avnet declined to affirm that it would not use subcontractors, which was the reason that two other bidders were disqualified. However, Avnet's refusal to affirm this appeared not in its main response to the bid, but in an addendum attached at the end.[62] Being unable to confirm the thought processes involved in the bid evaluation process back in 2005, South San Antonio can only assume that Ms. Soto simply overlooked the language in the attachment, and relied instead on Avnet's response to the main document, which gave no indication that Avnet objected to the subcontractor ban.

Further, it is also easy to see how the SBC bid was confusing. SBC first wrote a letter stating it planned to use subcontractors and then did not object to that language when it actually submitted its bid.[63] There is no documentation available to South San Antonio that indicates SBC clearly rescinded its initial letter. In light of the uncertainties about how the staff analyzed the bids back in 2005, and the resulting challenges South San Antonio faces in attempting to defend itself, USAC should not have been so quick to second-guess South San Antonio's actions more than a decade ago.

Although it has never said so, USAC may have thought that Ms. Soto disqualified the other bidders because she preferred Avnet even though it submitted the most expensive bid. But Ms. Soto had no reason to do so. Technology directors, like all employees of a public school district, have budgets. Technology directors, like all school employees, usually are rewarded for keeping their expenses as low as possible. Even though South San Antonio was not paying the

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[62] *See* Exhibit 3a, Avnet RFP Response (After Section 1.3 Terms and Conditions, document titled "Contract Response": "9. Exception: Avnet respectfully takes exception to this statement 9 and requests its deletion.").

[63] *See* Exhibit 14, SBC Letter dated Jan. 27, 2005 asking to remove sub-contractor clause. In its RFP, SBC agreed to the subcontractor clause, but it did not note that it had backed away from its previous statement of January 27.

entire amount of the equipment's costs, it still had to pay for a significant amount of the costs. If USAC believed that something underhanded was behind Ms. Soto's decisions, it should have investigated that and come to a determination. If it did so and came up empty-handed, then Ms. Soto's apparent mistake was simply that—a mistake. If USAC believed the price of Avnet's bid was "too high," perhaps it should have considered the possibility that Avnet did not charge the District Avnet's lowest corresponding price. Rather than assume that the district was at fault, perhaps USAC should have considered the possibility that the District was being overcharged and was itself a victim.

C. South San Antonio Did Not Violate the Eligible Entity Rule

USAC also found that South San Antonio had purchased and installed services to an ineligible entity. While USAC is correct that South San Antonio purchased services for a school (Antonio Olivares Elementary School) that it subsequently leased to Texas A&M University, the school was an entity at the time that the services were installed, South San Antonio still owns the equipment. It is South San Antonio's understanding that Texas A&M University used its own equipment, not the E-rate funded equipment. As such, when the equipment was purchased in February 2005, South San Antonio fully expected to use that equipment for its students. When it closed the school, it simply left the equipment there, having no other school that needed it, in the hopes that it would be used by the District at a later time. Under those circumstances, South San Antonio does not believe that it violated the eligible entity rule.

Furthermore, even if South San Antonio *had* violated the rule, it cannot confirm, with what documentation it retains from funding year 2005, the amount that USAC claims it must repay for such violation. USAC has not provided documentation explaining how it calculated the amount it seeks to recover for this alleged violation, even though South San Antonio has

asked USAC to provide such documentation. South San Antonio respectfully argues that USAC should have to support its recovery actions with documentation—especially when the funds were disbursed more than a decade ago, and the school district is no longer required to retain the relevant documentation. If the Bureau agrees with USAC that South San Antonio purchased services for an ineligible entity, South San Antonio must be allowed to challenge the amount USAC says it owes as a result of such violation. At a minimum, therefore, the Bureau should direct USAC to provide documentation to South San Antonio showing how USAC calculated the amount it seeks to recover.

V. IN THE ALTERNATIVE, A WAIVER OF THE COMMISSION'S RULES IS IN THE PUBLIC INTEREST

As we have explained, USAC's COMAD was time barred by 28 U.S.C. § 2462, violated South San Antonio's due process rights, and was wrong on the merits, and for these reasons the Bureau should grant this appeal and reverse USAC's decision. However, should the Bureau disagree, South San Antonio respectfully requests in the alternative that the Bureau waive the Commission's rules to the extent necessary to grant the requested relief.

Any of the Commission's rules may be waived if good cause is shown.[64] The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.[65] In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[66]

[64] 47 C.F.R. § 1.3.

[65] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (Northeast Cellular).

[66] WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969); Northeast Cellular, 897 F.2d at 1166.

As noted above, any mistakes that Ms. Soto made in her determinations on the competitive bidding process were simply that—mistakes. The Commission has historically waived its rules for mistakes.[67] This situation is no less worthy of relief from the Commission.

South San Antonio is a poor school district that does not have $9 million on hand to repay this funding. It will have to make drastic cuts in all areas of its budget well into the future in order to repay this money. Having to repay a large amount of funding is far more challenging to a school district than having had to make do without it in the first place. Had South San Antonio been denied funding in the first place, it would have made do with less advanced internal networks, or it would have budgeted as best it could to upgrade its internal connections where possible. Going forward, South San Antonio—and, indeed, all school districts—will have to consider whether it is worth it to gamble on E-rate funding when it can be revoked long after it has been spent, even decades into the future. In short, it does more harm than good to penalize South San Antonio so harshly for this shortcoming so many years after it occurred. This outcome cannot possibly be in the public interest.

Finally, a waiver would further the goals of the E-rate program and would thus be in the public interest. As we explained above, USAC's attempt to recover funds from 2005 not only harms this individual school district; it actually undermines the entire universal service program. Pursuing recovery of funds disbursed more than a decade ago is inconsistent with the very purposes and goals of the program because it will have the effect of discouraging school districts from applying for E-rate support at all. Congress established the principle that "[e]lementary and

[67] *See, e.g., Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, et al., Schools and Libraries Universal Service Support Mechanism,* CC Docket No. 02-6, Order, 21 FCC Rcd 5316, 5326-27 ¶¶ 22-23 (2006) (directing USAC to provide applicants with an opportunity to cure ministerial and clerical errors on the FCC Forms that they submit to USAC).

secondary schools and classrooms . . . and libraries should have access to advanced telecommunications services."[68] But schools and libraries will cease to take advantage of universal service funding if they can never be certain that they no longer have to worry about USAC seeking to reclaim the money. As public entities, school district and library budgets simply are not designed to withstand this level of uncertainty. Eventually, school districts will feel that they have no choice but to forgo E-rate funding, rather than assume the risk involved because USAC chooses to ignore the statutory five-year limitation period and the Commission's directive to complete investigations within five years.

VI. CONCLUSION

For the foregoing reasons, the Bureau should grant South San Antonio's request for appeal or, in the alternative, its request for waiver.

Respectfully submitted,

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October 26, 2017

[68] 47 U.S.C. § 254(h).

CERTIFICATE OF SERVICE

This is to certify that on this 26th day of October, 2017, a true and correct copy of the foregoing Request for Review and/or Waiver was sent via email to:

SLD, Universal Service Administrative Company, Appeals@sl.universalservice.org

This is to certify that on this 26th day of October, 2017, a true and correct copy of the foregoing Request for Review and/or Waiver was sent via mail to:

Cathi Whelan
Insight Public Sector, Inc.
2525 Brockton Drive Suite 390
Austin, TX 78758-4411

/s/ Gina Spade